STATE OF MICHIGAN

COURT OF APPEALS

SHARON K. BENSON, Personal Representative of THE ESTATE OF DAVID LEE BENSON, Deceased, and SHARON K. BENSON, Individually,

Plaintiff-Appellant,

v

CONSUMER POWER COMPANY,

Defendant-Appellee.

UNPUBLISHED
November 8, 1996

No. 183379, 186488
LC No. 92-015075-NI

Before: Michael J. Kelly, P.J., and O'Connell and K.W. Schmidt,* JJ.

PER CURIAM.

Plaintiff appeals the grant of defendant's motion for a directed verdict in plaintiff's intentional tort action against defendant in which she sought to recover for decedent's death by electrocution during his employment with defendant. We affirm.

I

Plaintiff challenges the trial court's grant of defendant's motion for a directed verdict pursuant to MCR 2.515. Such a motion may be granted when, after viewing the evidence presented by plaintiff in her case-in-chief in a light most favorable to the nonmovant, the trial court determines that plaintiff failed to establish a prima facie case. *Lock v Pachtman*, 446 Mich 216, 223; 521 NW2d 786 (1994). We will not disturb a trial court's grant of a motion for a directed verdict unless there was a clear abuse of discretion. *Phillips v Deihm*, 213 Mich App, 389, 395; 541 NW2d 566 (1995).

As a general rule, an employee's work-related injury is covered by the exclusive remedy provision of the Worker's Disability Compensation Act [WDCA], MCL 418.131(1); MSA 17.237(131)(1). However, an exception exists where the injury is the result of an "intentional tort," which is defined in §131 of the WDCA:

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* Circuit judge, sitting on the Court of Appeals by assignment.

> An intentional tort shall exist only when an employee is injured as a result of a deliberate act of the employer and the employer specifically intended an injury. an employer shall be deemed to have intended to injure if the employer had actual knowledge that an injury was certain to occur and willfully disregarded that knowledge.

We have repeatedly acknowledged the difficulty of determining what actions by an employer are sufficient to constitute an intentional tort. See, e.g., *Golec v Metal Exchange Corp*, 208 Mich App 380, 386; 528 NW2d 756 (1995); 453 Mich 149; ___NW2d___, *Benson v Callahan Mining Corp*, 191 Mich App 443, 450-451; 479 NW2d 12 (1992) (Sullivan, J., concurring). It is clear, however, that the intentional tort exception of §131 "is not triggered simply because the employer had actual knowledge that an injury was likely to occur at some point during the performance of a given task." *Oaks v Twin City Foods, Inc*, 198 Mich App 296, 297; 497 NW2d 196 (1993). Likewise, the creation of an unsafe working situation is not sufficient to invoke the intentional tort exception. *Phillips v Ludvanwall, Inc*, 190 Mich App 136, 140; 475 NW2d 423 (1991).

In the present case we conclude, as did the circuit judge, that plaintiff failed to present a prima facie case under §131 of the WDCA. The evidence, viewed in a light most favorable to plaintiff, reveals that defendant, through its employee Mullen, violated various safety rules and regulations while supervising power restoration after an August 1989 storm. Mullen failed to guard the downed, energized 4800 volt primary line, and sent decedent to trim trees at a work site without specifically warning decedent that the downed primary line was energized.

The evidence supports the conclusion that defendant may have provided an unsafe working environment; however, the evidence fails to support the conclusion that defendant had actual knowledge that an injury was certain to occur and yet willfully disregarded that knowledge. MCL 418.131(1); MSA 17.237(131)(1). Defendant's failure to provide a safe working environment is insufficient to support an intentional tort claim under §131 of the WDCA.

The circuit judge properly granted defendant's motion for a directed verdict.

II

Plaintiff also challenges the circuit judge's award of mediation sanctions. Pursuant to MCR 2.403(O), a party who rejects a mediation evaluation is subject to sanctions if he fails to improve his position at trial. These sanctions include expert witness fees and reasonable attorney fees. MCR 2.403(O)(6). We review a decision to award taxable costs and attorney fees for an abuse of discretion. *Giannetti Bros Constr Co v Pontiac*, 175 Mich App 442, 449; 438 NW2d 313 (1989); *Century Dodge, Inc v Chrysler Corp*, 154 Mich App 537, 544-545; 398 NW2d 1 (1986).

Plaintiff argues that the trial court erred in awarding expert witness fees because defendant's expert, Frank Denbrock, did not testify at trial and because the bill submitted by Denbrock is not believable. It was proper for the trial judge to award expert witness preparation fees even though his trial testimony was not necessary because defendant's motion for a directed verdict was granted. *Herrera v Levine*, 176 Mich App 350, 357-358; 439 NW2d 378 (1989). As for plaintiff's challenge

to the veracity of the expert witness's bill, we conclude that the trial court's award was not an abuse of discretion. However, another panel of this Court has recently held that even if deposition transcripts were not read into evidence in trial the trial court has discretion in granting the costs applicable thereto if the court found the award appropriate by way of preparation fees. Such costs were not taxable however unless the depositions had been filed in the clerks's office as required by MCL 600.2549; MSA 27a.2549. *Portelli v I.R.. Construction Products Co Inc*, released September 6, 1996, docket no. 172601 and no. 173876. ___ Mich App ___; ___NW2d___ (1996). We of course are bound by that determination, accordingly we must remand to the trial court for reduction of the award as may be necessary in accordance with *Portelli, supra*.

Plaintiff also argues that the trial court's grant of attorney fees was erroneous, insisting that because defendant's attorney was its own corporate counsel, the trial court's award in excess of defense counsel's actual fee was necessarily unreasonable. This argument is without merit, as MCR 2.403(O) mandates that a trial court assess reasonable attorney fees, not actual attorney fees. *Cleary v The Turning Point*, 203 Mich App 208, 211-212; 512 NW2d 9 (1994); *Johnston v Detroit Hoist & Crane Co*, 142 Mich App 597, 599-601; 370 NW2d 1 (1985).

Plaintiff has failed to demonstrate the circuit judge's award of costs and attorney fees was an abuse of discretion.

Affirmed. Remanded for adjustment of award of deposition costs as may be appropriate pursuant to *Portelli, supra*. We do not retain jurisdiction.

/s/ Michael J. Kelly
/s/ Peter D. O'Connell
/s/ Kenneth W. Schmidt